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IN THE
COURT OF APPEALS OF INDIANA

MARK A. URICK and HEATHER URICK, Appellants/Cross-Appellees (Plaintiff/Counterclaim Defendant and Third-Party Defendant), vs. GEORGE HUIZINGA and BLINDS, INC. d/b/a WINDOW FASHION DESIGNS, Appellees/Cross-Appellants (Defendants/Counterclaim Plaintiff and Third-Party Plaintiff).	)	No. 29A05-0604-CV-180

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0303-CC-188

March 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Mark A. Urick filed a complaint against George H. Huizinga, Jr. and Blinds, Inc., d/b/a Window Fashion Design (collectively, Huizinga), alleging breach of contract. Huizinga filed a counterclaim against Mark and a third-party complaint against Mark's wife, Heather P. Urick (also referred to as Heather Pons)(collectively, the Uricks), alleging actual and constructive fraud, breach of fiduciary relationship, and unjust enrichment. Following a bench trial, the trial court granted judgment in favor of Huizinga on both Mark's complaint and Huizinga's counterclaim and third-party complaint. The Uricks appeal and raise the following restated issues:

1. Was there sufficient evidence to support the finding of actual fraud?
2. Was the trial court's damages award erroneous?[1]

We affirm.[2]

The facts favorable to the ruling are that Mark was the president and sole shareholder of Window Fashion Design, Inc. (WFD, Inc.), an S corporation formed in

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[1] Huizinga cross-appeals and raises the same issue (*i.e.*, whether the trial court's damages award was erroneous). We will address both contentions simultaneously.

[2] The Uricks failed to include a copy of the trial court's order in their brief, as required by Ind. Appellate Rule 46(A)(10)("[t]he brief shall include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal"). We remind counsel that "'[t]he purpose of the appellate rules, especially Ind. Appellate Rule 46, is to aid and expedite review, as well as to relieve the appellate court of the burden of searching the record and briefing the case[,]'" *Neptune v. Ogan*, 858 N.E.2d 696, 696 (Ind. Ct. App. 2006) (quoting *Sheperd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004)), and of the possible consequences of failure to conform with the rules of appellate procedure. *See, e.g., Payday Today, Inc. v. McCullough*, 841 N.E.2d 638, 640 n.2 (Ind. Ct. App. 2006) ("we decline to consider Appellee's Brief as it does not address the contentions raised in the Appellant's Brief and fails to conform to numerous provisions of Indiana Appellate Rule 46").

1995 that was in the window treatment business. Through WFD, Inc., Mark operated two stores: Window Fashion Design I (WFD I), located in Carmel; and Window Fashion Design III (WFD III), located in Zionsville. (Window Fashion Design II was owned by Mark's sister and was entirely distinct from WFD, Inc.) Heather began working for Mark in 1997, and later the two married in September 2001. Heather was formerly a certified public accountant, but that certification lapsed by the time she began working for Mark.

In 1999, Mark decided to sell all of his stock in WFD, Inc., and contracted with Larry Battershell, an agent with Indiana Business Resource (IBR), in order to facilitate the sale. In March 2000, Huizinga became aware that Mark wanted to sell his stake in WFD, Inc., and in early April 2000 he met with Mark regarding the business. At that time, Huizinga operated a Budget Blinds franchise that was wholly owned by Huizinga, Inc., which was Huizinga's wife's company. When Huizinga met with Mark to discuss the sale of WFD, Inc., Mark gave Huizinga a "Confidential Business Profile" and referred him to Battershell. *Exhibits* at 15 (sequentially, p.53).[3] The "Confidential Business Profile" contained the following relevant information: (1) WFD, Inc.'s "[g]ross revenues [we]re $1.1 million a year[,]" *id.*; (2) the "owner's[, *i.e.*, Mark's,] cash flow [was] over $175,000 a year[,]" *id.*; (3) the "asking price" was $450,000, *id.*; and (4) the

[3] The index of the volume entitled "Exhibits" lists the "Confidential Business Profile" as appearing on page 15. The "Confidential Business Profile" in fact appears on the page following that which is marked as page 15. For ease of navigation, we note the "Confidential Business Profile" is sequentially the fifty-third page of the Exhibits volume. Given the numbering scheme of this volume, there appears to be no simpler way of indicating the location of the "Confidential Business Profile." This proviso applies to every reference to the Exhibits.

"information [contained on the profile] [wa]s believed true, but [wa]s not verified. No warranty [wa]s expressed, nor [wa]s it implied." *Id.*

Shortly thereafter, Huizinga signed a confidentiality agreement provided by IBR and Battershell arranged a meeting between him, Mark, Heather, and Huizinga. On April 5, 2000, Battershell provided Huizinga with the following documents relating to WFD, Inc.: A 1997 profit and loss statement; a 1998 profit and loss statement; a 1999 profit and loss statement; a balance sheet dated December 31, 1997; a balance sheet dated December 31, 1998; and a balance sheet dated December 31, 1999.

On April 12 or 13, 2000, Huizinga met with the Uricks and Battershell. At that meeting, the Uricks and Battershell provided Huizinga with the following additional documents relating to WFD, Inc.: (1) A profit and loss statement dated January 1999 – December 1999; (2) a profit and loss statement dated January 2000; (3) a profit and loss statement dated August 15, 1999 – November 30, 1999; and (4) a second profit and loss statement from WFD III dated January 2000. Regarding these documents, the Uricks told Huizinga the financial statements being reviewed were final, rather than preliminary. Additionally: Heather confirmed that WFD, Inc.'s cash flow was $175,000; both Heather and Mark informed Huizinga that Heather was still a certified public accountant; and the Uricks represented that the numbers contained on the documents relating to WFD III were in addition to (rather than included in) those contained on the documents relating to WFD I.

Following this meeting, Huizinga made a formal offer to purchase all of the shares of WFD, Inc. for $450,000 on April 21, 2000. Mark did not accept Huizinga's offer.

Rather, Mark and Huizinga agreed to dissolve their existing corporations (WFD, Inc. d/b/a WFD I and III, and Huizinga, Inc. d/b/a Budget Blinds of Greater Indianapolis, respectively) and create a new corporation known as Blinds, Inc. d/b/a Window Fashion Design (Blinds, Inc.). Accordingly, the two orally agreed that as of June 1, 2000, any new business would be diverted to Blinds, Inc.

On September 1, 2000, Mark and Huizinga formalized their oral agreement by signing a Purchase Agreement (the first agreement), the relevant portions of which stated:

> The parties desire to become shareholders of a new corporation to be formed (Blinds, Inc.) . . . .
>
> * * *
>
> 2. Dissolution of Window Fashion Design, Inc. [Mark] agrees to discontinue doing business under his solely owned corporation, [WFD, Inc.,] and agrees to assign all of the right, title and interest in the business assets of [WFD, Inc.] (excluding cash, accounts receivable, and marketable securities) including the name "Window Fashion Design" as part of the capitalization of the new Corporation, Blinds, Inc. . . . .
>
> 3. Organization of the new Corporation, Blinds, Inc. . . . The new corporation named Blinds, Inc., will do business under the name "Window Fashion Design". . . .
>
> 4. Purchase of Shares of Common Stock of new Corporation by Huizinga. [Mark] agrees to sell and Huizinga agrees to purchase fifty percent (50%) of [Mark's] voting common stock and sixty percent (60%) of [Mark's] nonvoting common stock for a purchase price of One Hundred Fifty Thousand and 00/100 Dollars ($150,000). Huizinga shall pay Fifty Thousand and 00/100 Dollars to [Mark] to execute the transfer of stock. And shall pay the remaining One Hundred Thousand and 00/100 Dollars ($100,000) of the purchase price pursuant to the terms of an installment promissory note to be paid over 48 equal monthly installments bearing interest at the rate of 9% per annum. [sic] The installment promissory note shall be secured by a pledge of the common shares purchased by Huizinga. The shares transferred shall be subject to any default of the promissory note, and rights of first refusal in the event of incapacitation of either parties [sic], and subject to a forced purchase provision described below in the event Huizinga does not exercise his option to purchase described in paragraph 5 below, which may be exercised by [Mark] for a period of 60 days following the termination of the one year option period. . . .

> 5. Option to Purchase Remaining Shares of [Mark]. At the time of the transfer of the initial Fifty Thousand Dollars of purchase price for shares described above, [Mark] shall also grant to Huizinga an option to purchase for a term of 9 months, beginning September 1, 2000, all of his remaining ownership interest in the corporation, Blinds Inc. for the option price of Two Hundred Fifty Thousand and 00/100 Dollars ($250,000). One Hundred Fifty Thousand Dollars ($150,000) of which shall be paid at the option closing to be held within 30 days of the exercise of the option, and the remaining One Hundred Thousand and 00/100 Dollars ($100,000) shall be added to the principal amount of the existing installment promissory note described in paragraph 4 above, to be amortized over three (3) years. [sic] The option terms shall be evidenced by the transfer of One Hundred Fifty Thousand Dollars ($150,000), and secured by a pledge of all the shares in the Corporation owned by Huizinga.
>
> * * *
>
> 8. Duties and Compensation. . . . Heather [] will be the Controller responsible for all accounting and financial issues. . . .
>
> * * *

Id. at 5 (sequentially, pp.6-7).

Subsequently, on January 4, 2001, Mark and Huizinga signed a new, updated purchase agreement (the second agreement). The second agreement stated, in relevant part:

> [Mark and Huizinga] became shareholders of a new corporation formed (Blinds, Inc.) . . . .
>
> * * *
>
> 3. Purchase of Shares of Stock of new Corporation by Huizinga. [Mark] agrees to sell and Huizinga agrees to purchase all of [Mark's] shares of Blinds, Inc. for a purchase price of Four Hundred Thousand and 00/100 Dollars ($400,000). Fifty Thousand ($50,000) Dollars of the Four Hundred Thousand Dollar purchase price has been received by [Mark].[4] The remaining Three Hundred Fifty Thousand Dollars $350,000 of the purchase price shall be paid according to the terms set forth below:
>
> For Value Received, the undersigned Huizinga, promises to pay to the order of [Mark[5]] the sum of Three Hundred Fifty

[4] Originally, the agreement referred to "Window Fashion Design, Inc", but this was amended by a handwritten note stating, "not a party[;] should be ['Mark.']" *Id.* at 6 (sequentially, p.10).

> Thousand Dollars ($350,000), with annual interest of 9.5% on any unpaid balance. The payments will be due over a five year term, and an [sic] equal, consecutive installments of Seven Thousand Three Hundred Fifty Dollars and Sixty Five Cents ($7,350.65) each, with a first payment due on January 04, 2001, and the same amount due on the same day of each month thereafter. . . . This note shall be due and payable on demand of any holder thereof should the undersigned default on any payment beyond thirty (30) days of its due date. . . .
>
> 4. Forced Purchase Agreement. Should the buyer Huizinga, default on any payment or does note [sic] follow the terms of this note described in paragraph 3 above, the undersigned, Huizinga, will forfeit all of his shares of ownership in Blinds, Inc. to [Mark]. . . .
>
> * * *

Id. at 6 (sequentially, pp.10-13). Also on January 4, Huizinga and Mark executed an "Installment Promissory Note[,]" which stated in relevant part:

> For value received on January 4, 2001, [Huizinga] . . . promise[s] to pay to [Mark] . . . the principal sum of Three Hundred Fifty Thousand Dollars ($350,000) and to pay interest on the unpaid balance . . . under the following terms:
>
> 1. Interest Rate. As long as there is no default under this Note, the interest rate shall be nine and one-half percent (9 ½ %) per annum ("Note Rate") through the date of the final maturity of this Note on January 4, 2006, and twelve and one-half percent (12 ½ %) per annum from maturity until the Note is paid in full.
>
> 2. Default Rate. In the event of a default under this Note, [Mark] may, in his sole discretion, determine that all amounts owing to [him] shall bear interest at a rate three percent (3%) above the Note Rate.
>
> 3. Payments. Huizinga shall pay sixty (60) monthly installments in the amount of Seven Thousand Three Hundred Fifty Dollars and Sixty-Five Cents ($7,350.65) beginning on February 4, 2001, and continuing monthly on the 4th day of each month until maturity of this Note on January 4, 2006. Until maturity, all payments made by Huizinga shall be applied first to late fees and expenses, then to accrued interest, and then to unpaid principal.
>
> * * *

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[5] *See supra* note 4 and accompanying text.

5. Late Payment Charge. If a payment is more than ten (10) days late, Huizinga will be charged a late payment charge of Four Hundred and 00/100 Dollars ($400.00) or five percent (5%) of the amount due, whichever is greater, as permitted by law.

6. Transaction Documents. This Note is being signed in connection with additional documents evidencing this credit extended from [Mark] to Huizinga, which documents include but are not limited to a Purchase Agreement, Pledge Agreement, Security Agreement, Corporate Guarantee Agreement and the like, all of which are referred to as the "Loan Documents". The terms and conditions of any Loan Documents are incorporated by reference in this Note. This Note and all extensions, renewals and replacements shall be secured by (i) all of the shares of common stock owned by Huizinga in Blinds, Inc. pursuant to a Pledge Agreement and (ii) the corporate guaranty of Blinds, Inc., pursuant to a Corporate Guarantee Agreement, each of which are of even date with this Note.

7. Events of Default. Huizinga will be in default if any one of the following events happen:

A. Huizinga fails to make a payment on this Note to [Mark] within ten (10) days of when payment is due.

B. Huizinga fails to perform any obligation or breaches any warranty or covenant to [Mark] contained in this Note, the Loan Documents, or any other present or future written agreement.

* * *

D. Huizinga allows the collateral securing this Note to be lost, stolen, destroyed, or damaged in any material respect, or subjected to seizure or confiscation.

* * *

Id. at 7 (sequentially, pp.16-17).

Additionally, the following documents were signed on January 4: (1) A "Corporate Guarantee Agreement[,]" pursuant to which Blinds, Inc. guaranteed Huizinga's payment and performance under the second purchase agreement, *id.* at 8 (sequentially, p.21); (2) a "Pledge Agreement[,]" pursuant to which "Huizinga pledge[d], warrant[ed], convey[ed] and grant[ed] to [Mark] and his successors and assigns forever a continuing security interest in and to all of the collateral[,]" including "all shares of . . .

Blinds, Inc.," "all warrants, rights and options . . . with respect to shares of . . . [Blinds, Inc.,]" "all . . . securities of [] [Blinds, Inc.,]" and "all substitutions and proceeds of and for shares of common stock of [Blinds, Inc.] owned by Huizinga . . . [,]" *id.* at 9 (sequentially, p.24); (3) a "Security Agreement[,]" pursuant to which Blinds, Inc. granted Mark a security interest in "all . . . 'Collateral' . . . now owned or subsequently acquired[,]" including "[a]ll personal property and fixtures[,]" "[a]ll Equipment[,]" "[a]ll Accounts Receivable[,]" and "[a]ll interest [Blinds, Inc.] has in the trade name 'Window Fashion Design[,]'" *id.* at 10 (sequentially, p.31); and (4) an "Amendment to [the second] Purchase Agreement[,]" pursuant to which the parties clarified that Huizinga, rather than Blinds, Inc., was the owner of the stock of Blinds, Inc. *Id.* at 11 (sequentially, p.39).

After January 4, 2001, Huizinga paid Mark according to the terms of the second agreement until November 2002, when Huizinga asked Mark to lower the monthly payment. In response to Huizinga's request, Mark lowered Huizinga's payment by $2,300 per month. Despite the lowered payments, Huizinga continued to experience financial difficulties and stopped making payments after January 2003. At the time Huizinga stopped making payments, he owed Mark $234,093.01. On January 29, 2003, Huizinga faxed the Uricks a letter addressing his concerns regarding Blinds, Inc. The relevant portions of the letter stated:

> I have spoken with both of you over the last several months regarding the lack of profitability of the business. It was and should have been extremely profitable based upon the 1999 P & L statements you gave me from 1999. When we all operated the business together in 2000, Heather kept the books. Her records showed that the business was extremely profitable in 2000, even with the increased overhead. . . . Both [purchase] agreements were signed by me based upon your representations

> concerning the profitability of this company and the P & L's provided by Heather. In fact, you told me that you took a lot of cash for jobs and that the company was even more profitable than the Profit and Loss statements showed.
>
> After I took over the books in 2001, I began to discover that the business was not as profitable as represented. In fact, after the books were reconciled, the business lost money in 2000. . . . The cash flow of the business is not sufficient to pay you. . . .
>
> I asked Heather for copies of the business tax returns for the three years prior to my purchase last week. This was prompted by my loan application and the bank's request for information about the profitability of the company before I purchased it. Heather refused to give me the returns because she said the returns would show a loss. Obviously, I was quite surprised because I had been told how profitable the business was.
>
> * * *

Id. at 12 (sequentially, p.45). The following day, the Uricks replied with a faxed letter, which stated, in relevant part: "You convinced us that you understood exactly what you were buying, how much it would cost you, and how long you had to pay for it." *Id.* at 13 (sequentially, p.48).

Huizinga and the Uricks were unable to resolve their differences, and Huizinga never made another payment. On March 5, 2003, Mark filed a complaint against Huizinga and Blinds, Inc., alleging "Default and Acceleration[,]" "Breach of Pledge Agreement[,]" "Breach of Guarantee Agreement[,]" and "Breach of Security Agreement[.]" *Appellant's Appendix* at 17, 18, 19. Thereafter, Huizinga and Blinds, Inc. filed a counterclaim against Mark and a third-party complaint against Heather alleging "Actual Fraud[,]" "Constructive Fraud[,]" "Breach of a Fiduciary Relationship[,]" and "Unjust Enrichment[.]" *Id.* at 41, 48, 49. Following a bench trial held on April 26 and

27, 2005, the trial court found against Mark upon his claims against Huizinga and Blinds, Inc., and found in favor of Huizinga and Blinds, Inc. upon their counterclaim and third-party claim against Mark and Heather, respectively. The Uricks appeal and Huizinga and Blinds, Inc. cross-appeal. Further facts will be included as necessary.

The trial court entered findings of fact and conclusions of law *sua sponte* and, therefore, we apply the following two-tier standard of review: Whether the evidence supports the findings; and whether the findings support the judgment. *Butler Univ. v. Estate of Verdak*, 815 N.E.2d 185 (Ind. Ct. App. 2004). Findings of fact and conclusions of law will be set aside only if they are clearly erroneous. *Id.* Findings and conclusions are clearly erroneous when the record contains no facts or inferences supporting them. *Id.* "'A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made.'" *Id.* at 190 (quoting *Learman v. Auto Owners Ins. Co.*, 769 N.E.2d 1171, 1174 (Ind. Ct. App. 2002), *trans. denied*). We consider only the evidence favorable to the judgment and all reasonable inferences drawn therefrom, and we will neither reweigh the evidence nor assess the witnesses' credibility. *Butler Univ. v. Estate of Verdak*, 815 N.E.2d 185. Findings entered *sua sponte* control only the issues they cover, and a general judgment standard of review controls issues upon which there are no findings. *Id.* "A general judgment will be affirmed if it can be sustained on any legal theory supported by the evidence." *Id.* at 190-91.

1.

The Uricks initially contend the trial court erred by not entering judgment in their favor on the breach of contract claims, arguing "Mark's proof of the[] elements [of the

breach of contract claims] was never disputed at trial, as [Huizinga] admitted that he stopped payment on the [promissory] [n]ote and violated the [s]ecurity [a]greement." *Appellant's Brief* at 17. The Uricks are correct: Huizinga failed to comply with the terms of the agreements by stopping payments after January 2003. In fact, Huizinga admits as much in his brief ("Huizinga . . . ceased making payments [as] required under th[e] [p]urchase [a]greements . . . [,]" *Appellee's Brief* at 31). We need not address this contention at length, however, because, as we explain below, Huizinga's failure to comply with the agreements' terms is not dispositive of the case. *See Sees v. Bank One, Ind., N. Am.*, 839 N.E.2d 154 (Ind. 2005) (fraud is an affirmative defense to enforcement of a contract).

The Uricks contend there was insufficient evidence to support the finding of actual and constructive fraud. When reviewing a claim of insufficient evidence, we neither reweigh the evidence nor judge the witnesses' credibility. *Hart v. Steel Prod., Inc., et al.*, 666 N.E.2d 1270 (Ind. Ct. App. 1996), *trans. denied*. Although the evidence may conflict, the judgment will be affirmed if there is substantial evidence to support it. *Id.* We will reverse only when there is an absolute failure of proof on some issue necessary to sustain the judgment. *Id.*

The elements of actual fraud are: (1) a material representation of a past or existing fact by the party to be charged that; (2) was false; (3) was made with knowledge or reckless ignorance of its falsity; (4) was relied upon by the complaining party; and (5) proximately caused the complaining party's injury. *Youngblood v. Jefferson County Div. of Family & Children*, 838 N.E.2d 1164 (Ind. Ct. App. 2005), *trans. denied*. Actual fraud

may not be based upon representations of future conduct, broken promises, or representations of existing intent that are not executed. *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150 (Ind. Ct. App. 2005).

The first element is that the Uricks made a material representation of past or existing fact. This element was clearly satisfied because the Uricks represented, among other things, the profitability of WFD, Inc. and Blinds, Inc. by their submission to Huizinga of the financial documents of each company. Regarding the second element, *i.e.*, falsity, the trial court found that "Ms. Urick, with Mr. Urick's knowledge, consent, direction, and assistance, materially misrepresented the profitability of Window Fashion Design and/or the profitability of Blinds, Inc." *Appellant's Appendix* at 7. The Uricks provided Huizinga with WFD, Inc.'s profit and loss statements from 1997 through 1999, and stated that the figures were final. The profit and loss statements represented that WFD, Inc. had a net income of $37,484.11 in 1997, $125,931.43 in 1998, and $124,864.61 in 1999. WFD, Inc.'s tax returns for the corresponding years, however, show it had a *loss* of $13,245 in 1997, a *loss* of $8,075 in 1998, and a *loss* of $4,917.14 in 1999. We cannot say, therefore, the trial court's finding regarding the falsity of the Uricks' representations was clearly erroneous.

The third requirement is that the material misrepresentation was made with knowledge or reckless ignorance of its falsity, which the trial court so found. The Uricks misrepresented to Huizinga the profitability of WFD, Inc. by maintaining that it had a net profit in 1997, 1998, and 1999 when, in fact, WFD, Inc. had a net loss during those years. Mark knew of the financial health of WFD, Inc. during those years because he was the

president and sole shareholder of the company, and Heather knew about WFD, Inc.'s profitability because she prepared its corporate tax returns for 1998 and 1999. The Uricks, therefore, knew of the falsity of their representations regarding WFD, Inc.'s profitability when they represented to Huizinga that the company had a net profit during 1997, 1998, and 1999.

The fourth element is that Huizinga relied upon the Uricks' material misrepresentations. Regarding this element, the trial court found the following:

> Huizinga made a preliminary inspection . . . of the financial documents that the Uricks made available to him through the business broker, and that inspection revealed nothing to put him on notice that the asserted cash flow was much higher than the actual profit level consistently reported on, for example, the undisclosed corporate tax returns. . . . [T]he Uricks [] gave reassuring replies to Huizinga's inquiries, and he relied on their answers to enter the transaction . . . . Indeed, starting as early as May 2000, only a few weeks after the parties sat down for their initial discussions of Huizinga's possible purchase of what ultimately became Mr. Urick's share of Blinds, Inc., Ms. Urick consistently rebuffed Huizinga's quite legitimate efforts to see the pertinent corporate tax returns, assuring him that the returns "had to match" the numbers Huizinga had seen[] when, in fact, each pertinent corporate tax return showed a loss. Making Huizinga's reliance on the Uricks' material misrepresentations all the more reasonable was the Uricks' representation of Ms. Urick as a Certified Public Accountant (CPA). . . . At no time before Huizinga committed himself to the deal did the Uricks reveal what was peculiarly within their knowledge – that all the financial information reviewed by Huizinga was only preliminary and not final, that the final figures were substantially lower than the figures Huizinga had seen.

Id. at 10-11 (quotation unattributed).

The evidence supports the trial court's findings. Huizinga asked for and was provided financial documents relating to WFD, Inc. The Uricks reassured Huizinga the numbers represented on the financial documents were final, rather than preliminary. The

Uricks further informed Huizinga that Heather was a CPA, which provided additional assurance of the accuracy of the figures contained in the financial documents. We reject the Uricks' argument that Huizinga failed to exercise due diligence because, they argue, Huizinga "never exercised his right to access [Blinds, Inc.'s] records" and "did not attempt to verify Blinds[,] Inc.'s year-end profitability or taxable income[.]" *Appellant's Brief* at 21, 22. Pursuant to their operational arrangement, Heather was responsible for inputting information regarding expenses and accounts payable into Blinds, Inc.'s accounting program. Further, the Uricks prevented Huizinga from accessing any corporate tax returns. The trial court's finding that Huizinga reasonably relied upon the Uricks' representations, therefore, is not clearly erroneous.

The final element is that the Uricks' material misrepresentations proximately caused Huizinga's injury. "'Proximate cause' exists when there is 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Keesling, et al. v. Beegle, et al.*, 858 N.E.2d 980, 992 (Ind. Ct. App. 2006) (quoting *Raybestos Prod. Co. v. Younger, et al.*, 54 F.2d 1234, 1243 (7th Cir. 1995)), *trans. pending*. The Uricks' material misrepresentations regarding the financial health of WFD, Inc. and Blinds, Inc. led Huizinga to agree to pay $400,000 for Blinds, Inc., and to actually pay more than half of that amount.

There was sufficient evidence of actual fraud and, therefore, the trial court did not err in finding against Mark upon his claim of breach of contract and in favor of Huizinga upon his claim of actual fraud. We need not address the Uricks' contentions regarding

constructive fraud because the judgment may be sustained upon the basis of actual fraud alone.[6]

2.

Both Huizinga and the Uricks challenge the trial court's damages award. We will sustain the trial court's damages award so long as the amount is supported by sufficient evidence in the record, *Ballard, et al. v. Harman*, 737 N.E.2d 411 (Ind. Ct. App. 2000), and is not contrary to law. *Marathon Oil Co. v. Collins*, 744 N.E.2d 474. In determining whether an award is within the scope of the evidence, we neither reweigh the evidence nor judge the witnesses' credibility. *Id.*

Generally, a party bringing an action for fraud must elect between two remedies. *A.J.'s Auto. Sales, Inc. v. Freet*, 725 N.E.2d 955 (Ind. Ct. App. 2000), *trans. denied*. The first option is to affirm the contract, retain the benefits thereof, and seek damages. *Id.* The other option is to rescind the contract, return any benefits received therefrom, and return to the status quo. *Id.* A party seeking rescission bears the burden of proving his right to rescind and his ability to return any property received under the contract. *Id.* An election to rescind a contract customarily forecloses the possibility of recovering general damages. *Id.* When a party elects rescission, he is entitled only to be returned to the status quo. *Id.* Returning a rescinding party to the status quo generally requires returning the money or other things received or paid under the contract, together with

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[6] The trial court concluded: (1) "Huizinga [] should be awarded full compensatory damages on his claim for actual fraud" or, "[a]lternatively," "Huizinga [] should be awarded full compensatory damages on his claim for constructive fraud . . . [,]" *Appellant's Appendix* at 2, 3; and (2) "[e]ither theory of fraud . . . supports a judgment in favor of Huizinga . . . ." *Id.* at 11.

reimbursement as special damages, for any reasonable expenditures incurred as a proximate result of the fraudulent conduct. *Id.* The rescinding party must also restore all benefits received under the contract. *Id.*

Huizinga contends the trial court's damages award was insufficient because "it should have included recovery of Huizinga's outstanding debts and business expenditures incurred as a foreseeable result of reliance on the misrepresentations." *Appellee's Brief* at 32. The Uricks' misrepresentations induced Huizinga to purchase Blinds, Inc. Incurring debt and making business expenditures were the foreseeable result of operating a business, not of purchasing one. Essentially, Huizinga requests a return to the status quo, which is effectuated by contract rescission. Huizinga, however, did not seek rescission; "rescission" was not mentioned in his counsel's opening or closing statements, nor was it requested in his counterclaim or third-party complaint.

Even assuming Huizinga requested rescission in his general prayer for "all other proper relief[,]" *Appellant's Appendix* at 47, he failed to prove his right to rescind and his ability to return any property received under the contract. *See A.J.'s Auto. Sales, Inc. v. Freet*, 725 N.E.2d 955 (party seeking rescission bears burden of proving his right to rescind and ability to return property received). To the contrary, Huizinga sold or otherwise dispensed with Blinds, Inc.'s inventory, sold or otherwise dispensed with the collateral that secured his debt to Mark, and terminated the lease of at least one of Blinds, Inc.'s retail locations. Huizinga, therefore, was not entitled to contract rescission and, thus, a return to the pre-contractual status quo. Huizinga was entitled to general damages equal to the sum of the payments made to Mark for the purchase of Blinds, Inc., because

it (Blinds, Inc.) was worth dramatically less than was represented by the Uricks. The trial court, therefore, did not err by finding that Huizinga sustained only the aforementioned "compensatory damages" and not ordering the Uricks to reimburse Huizinga for the outstanding debt and expenditures incurred in operating Blinds, Inc. *Appellant's Appendix* at 11. *See A.J.'s Auto. Sales, Inc. v. Freet*, 725 N.E.2d at 970 ("rescission of the contract is incompatible with general or compensatory damages").

Conversely, the Uricks contend the trial court's damages award was excessive because, "[b]y awarding [Huizinga] all monies he paid under the [agreements], the trial court effectively rescinded the Note and Loan Documents." *Appellant's Brief* at 31. As we concluded above, Huizinga did not seek to, and the trial court did not, rescind the contract. Huizinga neither pled nor argued for contract rescission, and the trial court made no mention of rescission in its findings or conclusions. The trial court made the following findings regarding damages:

> 5. Huizinga sustained the following compensatory damages:
>
> - a down payment in the amount of $50,000.00;
> - payments made in 2001 in the total amount [of] $80,857.15 ($7,350.65/month x 11 months);
> - payment made in the first eleven months of 2002 in the amount of $80,857.15 ($7,350.65/month x 11 months);
> - payments made in December 2002 and January 2003 in the total amount of $10,098.10 (the modified payment of $5,049.05/month x 2 months); and
> - lost use of the payments Huizinga made to [Mark], a loss that accrued when Huizinga first demanded repayment of his funds with the filing of his *Counterclaim and Third-party Complaint* in this cause on July 14, 2004.

Appellant's Appendix at 11 (emphasis in original). This finding is unambiguous and supported by the record and, therefore, is not clearly erroneous.

Judgment affirmed.

RILEY, J., and KIRSCH, J., concur.